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In The

Supreme Court of the United States

October Term, 1991

ROCCO P. DIGIOVANNI, JR.,

Petitioner,

vs.

TRAYLOR BROTHERS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the First Circuit Court of Appeals err in its decision that a barge that was designed and used for transportation over navigable waters was not a vessel for Jones Act purposes as a matter of law, even though the jury found it to be a vessel and even though it would be considered a vessel under twenty-seven different federal statutes, under definitions established by the United States Supreme Court and other Circuits, and under the common sense meaning of the term established by centuries of maritime jurisprudence?

LIST OF PARTIES

ROCCO P. DIGIOVANNI, JR.
Plaintiff-Petitioner

TRAYLOR BROTHERS, INC.
Defendant-Respondent

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No.

In The

Supreme Court of the United States

October Term, 1991

ROCCO P. DIGIOVANNI, JR.,

Petitioner,

vs.

TRAYLOR BROTHERS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Rocco P. DiGiovanni, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on March 4, 1992.

OPINION BELOW

The *en banc* decision of the United States Court of Appeals for the First Circuit is reported at *DiGiovanni v. Traylor Bros., Inc.*, ____ F.2d ____, 60 U.S.L.W. 2583 (1st Cir. 1992). The panel decision of the United States Court of Appeals for the First Circuit is not reported. Both decisions have been reproduced in the appendix.

STATEMENT OF JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the First Circuit entered on March 4, 1992. This petition is filed timely pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. § 688(a)

> (a) Application of railway employee statutes; jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring

> or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

On September 30, 1988 Rocco P. DiGiovanni was a member of the crew of a crane-carrying barge which transported a crane and supplies around Narragansett Bay in Rhode Island and participated in the building of piers and coffer dams for the Jamestown Bridge project. He was injured when he slipped on hydraulic fluid that had leaked on deck. DiGiovanni sought damages under the Jones Act, 46 U.S.C. § 688, and the general maritime law, and invoked the maritime jurisdiction of the United States District Court for the District of Rhode Island.

1. Physical Description of the Barges

The BETTY F is a 40' X 100' steel hull barge. It has a raked bow, which is at an angle from the front to the back. It has navigation lights for transportation. The vessel had to be maintained to Coast Guard standards. The Coast Guard boarded the BETTY F frequently to inspect it. The vessel was registered with the Coast Guard; when it was purchased, the respondent had to inscribe its name and its Wilmington, Delaware registration on the vessel for navigational reasons. The Coast Guard also required that the barge's anchor balls had to be painted white with quick flashing white lights on it for navigational reasons. A warning whistle had to be kept on board to warn other vessels. A fender system had to be placed on the side of the barge so that it wouldn't be damaged by nor cause damage to other vessels coming close to it. And, the men aboard had to wear life jackets.

The BETTY F was equipped with load lines, which the Coast Guard required be kept in a visible condition. The load lines were used to ballast the vessel down and keep it flat or trim. The barge also had internal compartments or bulkheads which would be filled with water to ballast the vessel. The BETTY F would travel to Davisville, Rhode Island and hook up to hydrants located there to fill it with water. Various compartments would be filled with water consistent with wind and tide conditions and to counterbalance whatever was on the other side of the barge, *i.e.*, if the barge's crane were lifting a heavy weight, etc.

The BETTY F had toilet facilities and an enclosed area where the crew could eat, which contained a small cafeteria with a stove and refrigerator. A tool shack and a sitting area were located near the bow of the vessel.

2. Movement of the Barges

The BETTY F carried a crane which it would transport around Narragansett Bay to construct piers and coffer dams for the Jamestown Bridge. The job could not be performed by a land-based crane. The barge had to be moved to put the crane wherever it was needed. Approximately once each month the BETTY F was moved across navigable waters, aided by a tug or push boat, in order to transport the crane to a new job site. The vessel had been outfitted in Davisville, Rhode Island one month before the accident, and presumably brought by tug to the job site where the injury occurred. The undisputed testimony of the petitioner is that he "travelled quite a bit on the BETTY F". The supply barge that was part and parcel of the BETTY F had transported cargo on the day of the accident. In fact, it would be brought to and from Davisville at various operations of the job whenever supplies were needed or anything else was needed at the job site. The supply barge carried a hammer that was part of the BETTY F's crane. It also carried a power pack, H beams, and sheetings.

The BETTY F was moved around the job site on a daily basis. Every day it was moved around the work area, and at night, it was moved away from the work area so that it wouldn't sustain any damage from the motion of the water or the wind.

3. The Petitioner's Job Duties

DiGiovanni was taken to the BETTY F each morning by tug boat. When the BETTY F was taken to a new job site, DiGiovanni would respond to the tug captain's orders as well as the barge captain's orders regarding the handling of the lines connecting the tug and barge and continue to slack and secure these lines during the voyage. He would ride the vessel to the new site, keeping watch in front of the barge so it wouldn't hit anything. DiGiovanni would check the vessel for seaworthiness, and clear its decks. He would also take part in the ballasting of the vessel. Another one of DiGiovanni's job duties was to act as a tag man during pile-driving operations.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT'S DEFINITION OF THE TERM "VESSEL" DIRECTLY AND IRRECONCILABLY CONFLICTS WITH DEFINITIONS ESTABLISHED BY THE SUPREME COURT, OTHER CIRCUITS, TWENTY-SEVEN FEDERAL STATUTES, AND CENTURIES OF MARITIME JURISPRUDENCE.

A. The Conflict Between the First Circuit and Other Circuits.

1. The tests employed to determine vessel status are different.

The Fifth Circuit looks to whether a structure is designed

for transportation over water. *See Ducote v. V. Keeler & Co., Inc.* , 953 F.2d 1000, 1003 (5th Cir. 1992) ("therefore we look to whether the structure has features that objectively suggest that one of its primary purposes may be transportation over water"). The Fifth Circuit looks at the following physical characteristics of a structure in determining whether it is a vessel: (1) navigational aids; (2) raked bow; (3) lifeboats and other lifesaving equipment; (4) bilge pumps; (5) crew quarters; (6) registration as a vessel with the Coast Guard; (7) intention of owner to move the structure on a regular basis; (8) ability of the submerged structure to be refloated despite years of corrosion and deterioration; (9) length of time the structure has remained stationary. *See Johnson v. Odeco Oil and Gas Co.*, 864 F.2d 40, 43 (5th Cir. 1989). The Eleventh Circuit also considers the design of the watercraft, and its physical characteristics. *See Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 506 (11th Cir. 1990) ("the critical inquiry is the purpose for which the craft was constructed and the business in which it is engaged"). Conversely, the First Circuit does not look at the purpose for which a vessel is constructed or designed. *See* Majority Opinion at 9 ("current use, not previous purpose, should be the test"). In his dissenting opinion, Judge Torruella notes that the First Circuit's novel rule "creates a new split". *Id.* at 24.

2. Application of the tests in factually similar cases has produced diametrically different results.

The First Circuit has destroyed uniformity of federal maritime law. If Rocco DiGiovanni had been injured in Louisiana instead of in Rhode Island, the jury verdict on his Jones Act claim would be allowed to stand. The Fifth Circuit recently held that, a man performing the same type of work as DiGiovanni on the same type of vessel that moved with the same amount of frequency could be found to be a Jones Act seaman. *See Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990). Both *DiGiovanni's* employer and *Sharp's* employer were construction companies

specializing in bridge and dock building. The project in both cases involved the driving of piles for the erection of piers. The *Sharp* vessel was similar to the BETTY F in many ways: it, too, was a spud barge with a raked bow, bilges, and navigation lights; it carried a crane and was "spudded" or anchored at the time of the accident; it moved away from the trestle at the end of every shift; it moved away from the job site several times in the months preceding the accident, and, it had a flat deck supply barge to transport materials to and from the work site. *See Sharp, supra.* In an even more recent case, the Fifth Circuit held that a crane-carrying spud barge that was moved at the time of the accident and that was used primarily as a work platform would support a jury finding of "vessel" for Jones Act purposes. *See Ducote, supra.*

B. The Conflict Between the First Circuit and the Supreme Court.

The *DiGiovanni* case is an affront to this Court's recent decision of *Southwest Marine, Inc. v. Gizoni,* 112 S. Ct. 486 (1991). Unlike the BETTY F, the Gizoni structures were without power, means of steering, navigation lights, navigation aids, or living facilities. However, this Court still affirmed the Ninth Circuit's opinion holding that questions of fact existed as to whether the floating platforms were vessels in navigation.

This Court has also found non-conventional watercraft which had less mobility than the BETTY F to be vessels for Jones Act purposes in less recent cases. In *Gianfala v. The Texas Co.*, 350 U.S. 879 (1955), the plaintiff worked on a drilling barge, which would be brought to the work site on a daily basis by boat. The barge only moved from one location to another approximately one time per year. *The Texas Co. v. Gianfala,* 222 F.2d 382, 384 (5th Cir. 1955). It was without navigation lights. At the time of the accident, the barge's spuds were in place, and, around the drilling hole, piles had been driven and board planking had been

nailed to the vertical piles to hold the barge in place. The Fifth Circuit reversed the jury finding of seaman status. 222 F.2d at 387. This Court reversed the Fifth Circuit's decision, and remanded the case to the District Court with directions to reinstate its judgment. 350 U.S. at 879. In *Senko v. La Crosse Dredging Corp.*, the vessel in question was a dredge that had been anchored to shore at all times during the plaintiff's employment and was seldom moved. 352 U.S. 370 (1957). This Court gave little weight to the relative immobility of the dredge or the fact that it was tied to the shore:

> Even a transoceanic liner may be confined to berth for lengthy periods; and while there the ship is kept in repair by its crew. There can be no doubt that a member of its crew would be covered by the Jones Act during this period, even though the ship was never in transit during his employment . . . thus, the fact that this dredge was connected to the shore cannot be controlling.

Senko, 352 U.S. at 373.

The *DiGiovanni* case also conflicts with this Court's rationale behind *McDermott Industrial, Inc. v. Wilander*, 111 S. Ct 807 (1991). It is inconsistent for the First Circuit to fail to recognize special purpose vessels where this Court has recognized special purpose seamen. The Court recognized that "navigation is not limited to putting over the helm. It embraces duties essential for other purposes of the vessel." 111 S. Ct. 812. A vessel by its very nature transports people or cargo across navigable waters to perform a specific function, whether it is to catch fish; to allow people to gamble offshore; or, to carry a crane and supplies to build a bridge to span a waterway.

C. The Conflict Between the First Circuit and Twenty-Seven Federal Maritime Statutes.

In a blistering dissenting opinion, Judge Torruella points out that "at least twenty-seven federal maritime or maritime related laws define 'vessel' in such a manner as to clearly include the BETTY F within the scope of their description". *See* Dissenting Opinion at 12a, and Appendix to Dissenting opinion. For example, the definition of the word "vessel", enacted as a rule of general construction of federal statutes, is as follows: "Every description of water craft or other artificial contrivances used, or capable of being used, as a means of transportation on water". 61 Stat. 633, 1 U.S.C.§ 3. Notwithstanding the lack of statutory definition for the term "vessel" in the Jones Act, the leading admiralty treatise states that the statutory definitions of the term and its meaning under the Jones Act should be virtually the same:

> There is no legally significant difference between the statutory definition of the term "vessel" and the meaning attributed to it by the general maritime law as obtaining in this country . . . It is highly unlikely that Congress in formulating a definition of a word of so immediate a connection with maritime law and so likely to recur in maritime legislation would have intended materially to depart from the meaning under the general maritime law . . . It is manifest that the legislation was predicated on the assumption that the statutory definition was identical with the meaning under the general maritime law.

1 Friedell, *Benedict on Admiralty* § 165, at 10-13 (7th ed. 1991).

II.

THE FIRST CIRCUIT'S NOVEL TEST IS ERRONEOUS, DIFFICULT TO APPLY, AND WILL SPAWN FURTHER LITIGATION.

It is not entirely clear what the First Circuit's new definition of "vessel" is. One way to interpret the decision is that one must first analyze any structure to determine whether its purpose or primary business is navigation or commerce. If it is not, a worker may only be considered a seaman when the structure is in actual navigation or transit. Another way to interpret the decision is that the above analysis applies only to a barge or float, and not to vessels in the traditional sense.

Either interpretation is seriously flawed. Under the first interpretation, a vessel in the most conventional and traditional sense could be considered a non-vessel if its purpose or primary business were not navigation or commerce. Boats used to carry people offshore for gambling purposes, or ships berthed for lengthy periods of time could be considered non-vessels under this interpretation. A problem with the second interpretation is that the First Circuit does not offer any guidelines on how to make the threshold determination as to whether a structure is a "vessel" or a "barge or other float". If the design of the structure or the purpose for which it was constructed cannot be considered in making this initial determination, what criteria can be used? The BETTY F had eight of the nine physical characteristics of a vessel as enunciated by the Fifth Circuit in *Johnson, supra.* Why then did the First Circuit consider it to be a barge as a matter of law? The First Circuit has mistakenly confused a barge designed and used for transportation over navigable waters with a work platform designed and built ashore to be used at sea in a permanent location. However, the First Circuit fails to define the term "barge", and even the

commentators do not have a precise definition of the term. *See* Bloomster, *Sailing and Small Craft Down the Ages*, at 95 (George Banta Co. 1940) ("the term "barge" has been applied to numerous types of vessels throughout the centuries"). *See also*, T. Hartman, *The Guinness Book of Ships and Shipping*, at 238 (Butler and Tanner LTD. 1983) ("barge" has been used at various times to describe different types of vessels). One term in the First Circuit's flawed test which causes confusion is "primary purpose". The First Circuit no longer looks to the purpose for which a vessel is constructed, and the decision does not offer any guidance as to how the term should be applied. Is "primary purpose" a function of the number of voyages that a structure makes in a given month? Is it the length of the voyages that a court should look to? Or, is it whether a structure is moving more often than it is standing still? The First Circuit has seemingly ruled that if a structure (which would be considered a vessel by any statutory definition, and even though built and designed for transportation across navigable waters) functions as a work platform more often than it plies the waterways, it is not a vessel. This could lead to absurd results. Every vessel is a work platform. If a fishing vessel were used more frequently to clean, process and freeze fish than to actually catch fish, would that make it a work platform and not a vessel? If a traditional vessel transports passengers one quarter mile offshore so that they may legally gamble and the vessel remains stationary for two weeks at a time, does that render the vessel a work platform and deny its captain and crew recovery under the Jones Act?

Another term in the test that is certain to pose problems is "in navigation". The First Circuit has confused the term "in navigation" with the term "in transit". There is no rational basis for making a distinction between navigation by the use of "moving with spuds"; by the use of deck winches to which lines leading to anchors are attached, enabling the vessel to navigate by means of reeling itself closer to the anchors; or, to the traditional

propulsion by engine. Traditionally, the term "vessel in navigation" is a term of art and relates only to its capacity to sail or be moved over navigable waters. To illustrate, a vessel is "out of navigation" where it is in drydock for an extended period of time or is permanently anchored or secured to the ground so as to lose its capacity for mobility. The leading treatise on admiralty notes, "[T]he structure does not, however, have to be in navigation at the precise moment that the injury to the alleged seaman occurred". 1B Bellman, *et al., Benedict on Admiralty* § 11a, at 2-6 (6th ed. 1990).

A final term that will spawn further litigation is the meaning of the word "commerce". Every dictionary defines commerce as business. How, then, can a commercial barge, float, or vessel not be considered as involved in commerce or business?

The building of piers and bridges spanning waterways is a traditional maritime activity, and special purpose craft are necessary to do the job. The BETTY F was not a platform built ashore and moved to a permanent worksite. Rather, it was built for the purpose or primary business of navigation or commerce. Even under the First Circuit's flawed standard the BETTY F qualifies as a vessel. The job site could not be reached by land-based pile drivers, hence the necessity for vessels like the BETTY F.

Courts have traditionally focused on the extraordinary dangers, hazards, and risks to which the sea exposes workers, and have made every effort to protect them by affording a remedy, rather than withholding it. DiGiovanni worked on the water and was exposed to these dangers and hazards on a daily basis. As such, he was subject to the vicissitudes of the wind, water and tide, and the perils of navigating and ballasting a vessel carrying a crane and ten ton hammer. He was certainly more exposed to maritime perils than the croupier on a gambling boat, or the hair stylist on a cruise ship.

III.

THIS ISSUE SHOULD BE RESOLVED BECAUSE IT DIRECTLY AFFECTS A LARGE NUMBER OF PEOPLE.

This case should be heard by this Court due to the large number of barges in this country, the ever increasing amount of barge traffic and concomitant accidents, and the great volume of maritime tort cases pending nationwide. Between 1978 and 1988, the number of registered vessels rose 33 1/3%. *National Transportation Statistics Annual Report* (July 1990). Of the 40,000 registered vessels, 31,125 were presumably barges (non-self-propelled vessels). *Id.* at 32. Moreover, 6,367 vessels were involved in marine accidents in 1988, a 15% increase over the previous year. *Id.* at 80. During that same period of time, the number of millions of tons of goods moved by barge increased from 3.8 tons to 4.6 tons, an increase of 21%. *See Waterborne Commerce of the United States* (Army Corps. of Engineers 1989). Over the past five years, approximately 3,000 maritime personal injury suits have been commenced annually; at any given time, there are roughly 4,000 maritime personal injury suits pending. *See Annual Report of the Director of the Administrative Office of the United States Courts* (1987-1991).

Uniformity in federal maritime law is traditional and essential for the commerce of this nation. Only recently this Court has decided two cases to promote uniformity of maritime law. *See Wilander, supra*, and *Gizoni, supra*. In fact, decisions upholding the uniformity of maritime law use that criterion as the supreme decision maker. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The result in a given maritime case should not hinge on the locus where the incident occurred.

CONCLUSION

For these various reasons, this petition for certiorari should be granted, or in the alternative, this Court should reverse the decision of the First Circuit Court of Appeals, and remand this case to the District Court with an order to reinstate the judgment upon jury verdict.

Respectfully submitted,

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APPENDIX A — OPINION EN BANC OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1957

ROCCO P. DIGIOVANNI, JR.,

APPELLEE,

V.

TRAYLOR BROTHERS, INC.,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, *U.S. District Judge*]

Before

Breyer, *Chief Judge*,
Aldrich, *Senior Circuit Judge*,
Campbell, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
Torruella, Selya and Cyr, *Circuit Judges*.

Andrew Rothschild with whom *Eric D. Paulsrud*, *John D. Husmann*, and *Lewis, Rice & Fingersh* were on brief for appellant.

Appendix A

David B. Kaplan with whom *Thomas M. Bond, The Kaplan/Bond Group, Paul Gallogly*, and *Lovett, Schefrin, Gallogly & Harnett* were on brief for appellee.

March 4, 1992

OPINION EN BANC

ALDRICH, *Senior Circuit Judge*. Defendant petitions for rehearing on the single issue of Jones Act recovery, renewing its claim that plaintiff, a member of the carpenter's union, is not a seaman, and the barge, the BETTY F, was not to be regarded as a vessel, particularly in light of a number of recent cases, notably in the Fifth Circuit. It asks us to reconsider our holding in *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975). Defendant asserts that, by speaking in terms of vessels, we have extended the concept of special protection needed for seamen exposed to the perils of the sea to workers who are not even theoretically so endangered. This, allegedly, is a carry-over of outmoded Supreme Court decisions, *post*. We will reconsider.

Briefly, the facts are these. The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Newport, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Newport bridge for a month. It was positioned

about the bridge, and moved away from the pilings at night, to prevent damage.

Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to *carry supplies*, but also served as a work platform.

The district court put special questions to the jury as between plaintiff being a Jones Act seaman and a harbor worker, and stated it could find the former — with greater rights — if he was attached to a vessel. Following *Bennett*, it stated, "A special purpose structure not usually employed as a means of transport by water, but designed to float on water may also be considered a vessel," and said nothing about its current use. The jury answered that plaintiff was a seaman, and defendant, having duly saved its rights, appealed. A panel, unanimous because it felt bound by *Bennett*, affirmed. This petition followed.

The Jones Act itself, 46 U.S.C. § 688, does not use the words ship and vessel, and speaks only of seamen, but courts have naturally spoken of seamen in terms of ships, vessels, and voyages. Thus in the recent case of *McDermott International, Inc. v. Wilander*, 111 S. Ct. 807, 814 (1991), the Court repeated the definition given in *Warner v. Goltra*, 293 U.S. 155 (1934), "a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' " *Warner*, 293 U.S. at 157 (citing *The Buena Ventura*, 243 F. 797, 799 (S.D.N.Y. 1916)); *see also, Norton v. Warner Co.*, 321 U.S. 565, 572 (1944).

And, of course, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside. *See Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 648 (lst Cir.), *cert. denied*, 414 U.S. 856 (1973). This practical fact availed the Court to hold that stevedores substituting for seamen in doing conventional seamen's work when the vessel was docked should equally come under the Act. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The reasoning was that the stevedore was "incurring a seaman's hazards." *Id.* at 99. In point of fact this could be said to be making the exception the rule. Seamen who go down to the sea in ships incur special hazards on the sea, not at dockside.[1] The reasoning that favors not interrupting their coverage during a temporary cessation of those risks does not equally favor opening the coverage to workers who substitute for seamen only during non-hazardous, non-voyage, intervals. This, however, was once law.[2] The battle between the Court and Congress, met by revisions in the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950, detailed in *Wilander*, 111 S. Ct. at 810-13, was won by Congress. Longshoreman and seaman status are now

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1. Because *Wilander* has now quoted it with approval, we repeat Chief Justice Stone's dissent in *Sieracki*. "Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules and sufferings from landsmen." 328 U.S. at 105 (citing *Reed v. Canfield*, 20 F. Cas. 426, 428 (C.C.D. Mass. 1832)).

2. One member of this panel still recalls *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), where we were reversed for denying the warranty of seaworthiness to a longshoreman who never set foot on the ship, but who was injured on the dock by unloaded cargo that had been improperly packaged; a defect held to make the ship unseaworthy, to plaintiff's benefit. Justice Harlan dissented. *Gutierrez* is now flotsam.

mutually exclusive. 111 S. Ct. at 817. "*All who work at sea* in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* (emphasis supplied). We followed that concept to a considerable extent in *Powers*, 477 F.2d 643 (1st Cir. 1973), *ante*, but we did so in terms of whether the structure was a vessel. The structure on which plaintiff was working was a raft, made of 12 x 12 timbers bonded together, used as a floating platform for pile workers and carrying sandblasting equipment and forms under piers to be placed around piles. We held it was not a vessel in spite of "occasional 'voyages' — when towed by workboat from one pier to another."[3] *Id.* at 647.

> Rafts, of course, may be designed or used 'to encounter perils of navigation . . . . But we cannot reasonably describe the present raft as other than a floating stage. Even with men and equipment on it, its *movement*, amounting mostly to a positioning under the pier *incidental to its intended use, was not navigation.*

Id. (emphasis supplied). Later in the opinion, we remarked that "the law of admiralty [is] 'designed and molded to handle problems of vessels relegated to ply the waterways of the world,' " *id.* at 648 (citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269 (1972)). Two years thereafter, however, we moved a long way from a waterway, holding that a pier worker who fell from a pier onto another land-based platform could

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3. "It had . . . also been towed through Boston harbor to other jobs." 477 F.2d at 645.

recover under the Jones Act because the barge on which he also worked, Scow 101, could be found to be a vessel. *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975). In a comparatively brief discussion, we distinguished *Powers*, saying that Scow 101's

> seagoing range and versatility are greater . . . . To be a vessel, the purpose and business must *to some reasonable degree be the 'transportation* of passengers, cargo, or equipment from place to place across navigable waters.' *Powers* at 477 F.2d 647. *A major function* of Scow 101 *appears to have been the transportation* of the structural materials and tools used to build the bridge and the crane across the navigable waters of Narragansett Bay.

510 F.2d at 116 (emphasis supplied).

Having determined that because of its "major function" of transportation, the scow was a vessel, the *Bennett* court faced the question whether plaintiff " 'contributed to the function . . . or to the accomplishment of its mission.' " *Id.* (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)). We noted that, as a carpenter, plaintiff spent much of his time on the pier. However,

> there was evidence that a major part of the carpentry work was regularly done on the deck of Scow 101, where the additional space provided a necessary platform for constructing and reworking the panels.

* * * *

Appendix A

> [T]he 'mission' of Scow 101 was to provide a support base for the construction of the bridge piers. Appellant's duties, if not obviously maritime, related to that function and were arguably essential for its satisfactory performance.

510 F.2d at 117. Thus while *Powers'* raft's transportation of sandblasting equipment from pier to pier, and "through Boston Harbor to other jobs," was "incidental," to its "intended use," Scow 101's transportation of a crane across Narraganset Bay was "to some reasonable degree" a "major function," and made the pier worker a seaman.

This produced a difficult dividing line. It is particularly troublesome in light of the fact that plaintiff Bennett was not a user of the crane, and thus connected with what was transported, but was simply using the floating deck space, comparable to the *Powers* raft, which this court described as "an extension of the pier, itself an extension of the land." 477 F.2d at 648. Nor, if transportation — the voyage — is the key to maritime responsibility, did the *Bennett* court make any mention of the length of jobs, and consequent voyage frequency. What we did was quote the amorphous wording of the *Offshore Company* opinion, "The 'injured workman [can go to the jury if he] was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water).' " 510 F.2d at 115 (quoting *Offshore*, 266 F.2d at 779), rather than the language of *Powers* stressing "special purpose floating structures whose function requires exposure to the hazards of the sea." 477 F.2d at 647.

This language from *Offshore* did not survive. Many decisions

later, in *Bernard v. Binnings Construction Co.*, 741 F.2d 824 (5th Cir. 1984), *Offshore* was relegated to a footnote. Floating is not enough. *Id.* at 828 n.13. Nor is "capability of movement across navigable waters." *Id.* at 829. Rather, the test is whether it

> was designed[4] or used primarily for the transportation of cargo, equipment or persons across navigable waters or was, at the time of Bernard's injuries, engaged in navigation.

Id. The court also noted

> that a structure whose purpose or primary business is *not* navigation or commerce across navigable waters may nonetheless satisfy the Jones Act's vessel requirement if, at the time of the worker's injury, the structure was actually in navigation.

Id. (emphasis in original).

This standard, as applied in a number of other Fifth Circuit cases,[5] looking to use, rather than simply to the physical characteristics of the structure, does appear a reasonable resolution of Jones Act principles as against mere definitions of vessels to

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4. Even this word was uncalled for. Current use, not previous purpose, should be the test. *Ducrepont* v. *Baton Rouge Marine Enters., Inc.*, 877 F.2d 393, 396 (5th Cir. 1989).

5. *E.g.*, *Gremillion* v. *Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990); *see also Hurst* v. *Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990).

convert longshoremen into seamen. A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operational "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past, or by its future potential, and to give him these special benefits by mechanical definitions without the exposure is misplaced generosity as in *Gutierrez*, n.2, *ante*. Just as we relied on *Offshore* in the past, we believe we should now accept the Fifth Circuit's improved version. In sum, if a barge, or other float's "purpose or primary business is not navigation or commerce," then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

That there should be a varying status designation depending on the activity at the moment is not a novel concept. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), a longshoreman who, because unloading, would have had unseaworthiness recovery under the Jones Act, per *Gutierrez*, for a ship-caused injury, was injured instead using the stevedore's equipment. Recovery was not allowed. We believe our division of responsibility to the activity equally appropriate.

Our rule is also in entire accord with *Wilander's*, language quoted in the second paragraph of this opinion and in n.1, *ante*. In holding that every member of the ship's complement comes within the Jones Act, *Wilander* referred to the "voyage," and "vessels in navigation." It spoke not in terms of the ship, but of "[a]ll who work at sea in the service of a ship [and] face those particular perils to which the protection of maritime law, statutory as well as decisional, is based." 111 S. Ct. at 817.

Again, more recently in *Southwest Marine, Inc. v. Gizoni*,

112 S. Ct. 486, 494 (1991), where the plaintiff was working on a floating platform, the Court referred to the opinion below, saying,

> The Ninth Circuit concluded that questions of fact existed regarding whether the floating platforms were *vessels in navigation*, and whether Gizoni had sufficient connection to the platform to qualify for seaman status.

(Emphasis supplied.) What is particularly interesting is the record which the Court held presented a jury question on each of these issues. It appeared from the opinion below, *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990), that defendant was a ship repairer who used floating platforms to support the workmen, and to carry materials and equipment. Plaintiff was on such a platform engaged in transporting a rudder to a ship when his foot went through the deck. Although plaintiff was a rigging foreman, his duties included handling lines, and he occasionally served as a lookout and gave maneuvering signals to the tugboat operator. 909 F.2d at 387. The platform, in other words, at the time of plaintiff's injury, was engaged in transportation, and plaintiff was a participant in that operation.

Under our rule we would be more favorable to the worker than was the *Gizoni* Court, if its language as to there being an issue of fact be regarded as a ruling. Clearly we would have felt the worker within the exception even if, during actual repair work to a floating ship, there was no navigation or commerce. But what is even more clear is that the present plaintiff does not measure up to *Gizoni*. The BETTY F had transported nothing for a month since it left defendant's headquarters in Davisville. Since then it was simply moved about the piers for working convenience, and

at night for safety. This was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose. *See Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803, 807 (5th Cir. 1990). Correspondingly, that plaintiff occasionally adjusted lines for pier movement and the rise and fall of the tides, did not expose him to the risks of a voyage.

There is a suggestion that the supply barge, on which plaintiff was injured, was operating as a vessel. This barge was in general use, and was not "attached" to the BETTY F, and plaintiff was not "assigned permanently" thereto. *Bennett*, 510 F.2d at 116. Nor did he use it except as a work platform. Whether plaintiff is to be considered a seaman must depend upon the BETTY F.

A final word. Our denying Jones Act recovery does not end this case. The court put alternate questions to the jury; posing simple negligence under the LHWCA if the jury did not answer the Jones Act questions favorably. Since it did answer favorably, it did not answer the alternate negligence questions. In all fairness, there should be a new trial, with that heavier burden.

Reversed and remanded for further proceedings consistent herewith.

Dissent follows.

Appendix A

TORRUELLA, *Circuit Judge*, with whom BOWNES, *Senior Circuit Judge*, joins (Dissenting). William Shakespeare tells us in a famous passage from *Romeo and Juliet* that labels are not important, but rather that content is what counts.[6] In more recent times, Gertrude Stein had similar advice.[7] Although poetic philosophy seems far removed from the hard world of maritime torts, I believe that the counsel found in those quotations has definite relevance to the issue that separates my views from those of my colleagues in the majority.

Notwithstanding the lack of a statutory definition for the term "vessel" in the Jones Act, 46 U.S.C. § 688,[8] at least twenty-seven (27) federal maritime or maritime related laws[9] define "vessel" in such manner as to clearly include the BETTY F within the scope of their description. The BETTY F is thus a "vessel" under the Shipping Act, 46 U.S.C. § 2101(45), and the Merchant Marine Act, 46 U.S.C. § 801. It is covered as such by the International and Inland Rules of the Road, 33 U.S.C. §§ 1601(1), 2003(a), can be mortgaged under the Federal Ship Mortgage Insurance Act, 46 U.S.C. § 1271(b), must have its bottom painted within the restrictions of the Antifouling Paint Control Act, 33

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6. "What's in a name? That which we call a rose
By any other name would smell as sweet."

Shakespeare, William, *Romeo and Juliet*. II, ii, 43.

7. "Rose is a rose is a rose is a rose." Stein, Gertrude, *Sacred Emily* (1913).

8. 46 U.S.C. § 688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury.

9. *See* Appendix to this opinion.

U.S.C. § 2401(11), and even falls within the definition found in the Sentencing Guidelines Act, 18 U.S.C. § 3615. In contrast, I have found no federal maritime statute which would label the BETTY F anything other than a vessel. It would seem that the weight of these Congressional pronouncements alone would be enough to sustain appellee's case if for no other reason than by its recognition of the time honored doctrine of *in pari materia*. *See McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 811 (1991); *Morissette v. United States*, 242 U.S. 246, 263 (1952); *United States v. Porter*, 591 F.2d 1048, 1053 (5th Cir. 1979).

Because "[t]he inquiry into seaman status is of necessity fact specific: it will depend on the nature of the vessel, and the employee's precise relation to it," *Southwest Marine, Inc. v. Gizzoni*, ___S. Ct.___ (1991); *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. at 818. I believe that it is useful to spell the facts out in somewhat greater detail than is done in the majority opinion.

THE FACTS

Appellee was injured aboard a supply barge while tending tag lines to a crane aboard the barge to which he was assigned, the BETTY F. These two barges worked together with the supply barge not only carrying supplies to be used aboard the BETTY F, but more significantly, transporting part of BETTY F's crane at the time of the accident.

The BETTY F is a typical steel-hulled barge designed to transport cargo or act as a work platform. It is 100 feet in length overall, has a 40 foot beam, raked bows and stern, and carries a roll-on crane in its aft area. It has toilet facilities for the crew, and what amounts to a galley in the form of an enclosed cafeteria

with a stove and refrigerator, where the crew regularly take their meals. A tool shack and a sitting area are located in its bow section. The evidence presented at trial established that this vessel is routinely inspected by the Coast Guard for compliance with its regulations, as well as by surveyors for marine insurance purposes. Sea trials are also conducted to determine its seaworthiness and insurability.

As part of its compliance with Coast Guard requirements, the BETTY F had port and starboard navigation lights which were used when the barge was moved at night. It also carried and used anchor signals when not in movement, white balls which are hoisted when working at anchor in day time and a white anchor light and whistle for working at night. As required by regulations, its name and home port, "Wilmington, Delaware," are painted on its stern. Pilsom marks, indicating its load lines, are painted on its sides as is normally the case with other vessels. By observing these markings, the BETTY F's ballast is periodically shifted, thus maintaining a seaworthy trim. The BETTY F was frequently boarded and inspected by the Coast Guard pursuant to its legal duty to see that vessels are in compliance with the maritime laws of the United States. *See* 14 U.S.C. § 2; *Dougherty v. Santa Fe Marine Inc.*, 698 F.2d 232 (5th Cir. 1983) (Failure to follow any Coast Guard regulation which is cause of an injury establishes negligence per se).

The BETTY F was based in Davisville, Rhode Island, from where it was towed by a tug to its various work locations, including its workplace at the time of appellee's injury, a bridge under construction in Jamestown, Rhode Island. The tug moved the BETTY F "to whatever area we were going to." It was "moved quite a bit." In August, the month before appellee's accident, the BETTY F had been outfitted in Davisville. Although a tug

was used to move the BETTY F most of the time, it also had four spud anchors which could be used to reposition the barge once on location. At the location in question, the BETTY F was moved away from the bridge's pilings every night to prevent damage by the tidal surge.

Appellee, as well as the rest of the BETTY F's crew, were transported to work each day from Davisville by a crew boat. Although appellee's principal duties on the BETTY F were as a tagman for the crane, his work also included typical able seaman's duties aboard a steel vessel: chipping, painting and providing basic maintenance to the hull, tending mooring lines, fendering the vessel setting and resetting the anchors moving the barge away from the bridge every night and ballasting the hull. When moved by the tug, the BETTY F's crew, including appellee, worked together with the tug's crew and under the tug captain's orders. In fact, many times appellee would actually be physically aboard the tug during these operations.

As previously indicated, appellee was working on the supply barge when he was injured. This barge is an integral part of the BETTY F's operation, and has no separate name or identification. It is 80 feet in length and has a 40 foot beam. Towed by a tug, it traveled back and forth on an almost daily basis from its main base in Davisville, bringing materials and equipment to the BETTY F.

The record contains additional information, which although admittedly less relevant, adds a definite maritime flavor to the activities aboard the BETTY F. At least part of the BETTY F's crew was composed of former merchant seamen. The crew wore life jackets while working aboard the BETTY F. The *lingua franca* of the crew/witnesses with reference to the BETTY F is seaborn

in nature, i.e., "crew," "aboard," "load lines," "ballast," "anchors," "bow," "stern," "forward," "aft," "alongside," "midships," "deck" and "ashore." This terminology is found throughout the record. Although it might be argued that this is stretching a self-serving argument, I point out that this language was not only used by appellee's witnesses but also by appellant's attorney throughout the trial, and his expert witness, Davis C. Du Bois, who at all times during his testimony referred to the BETTY F as a "vessel." I suggest that this conduct reflects an acceptance by appellant of an undeniable reality, at a time when the status of the BETTY F as a vessel was taken for granted.[10] In fact, all who dealt with the BETTY F, the Coast Guard, its crew, its owners, that is, all except this Court, treated the BETTY F as if it were a vessel, not something else. Lest we forget, no one argues that the BETTY F is physically or structurally any different than the thousands of similar barges which ply the oceans of the world or that the BETTY F is incapable of engaging in such commerce. Rather, the downgrading of the BETTY F to non-vessel status seems to be anchored on the frequency, or more accurately, the infrequency, of its voyaging.

DISCUSSION

In my opinion the majority's change in course fails to take into account the Supreme Court's traditionally liberal construction in deciding who is a "seaman" under the Jones Act. *See Cox v. Roth*, 348 U.S. 207, 210 (1954). We find the most recent expression of this unswerving trend in the Court's unanimous decisions in *Southwest Marine, Inc. v. Gizzoni, supra*, and

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10. I might add, only in half jest, that people usually do not name non-vessels. This seems to indicate that the BETTY F's owners considered it enough of a "vessel" to treat it in a traditional vessel fashion.

McDermott Int'l Inc. v. Wilander, 111 S. Ct. at 814 ("[t]he Jones Act is a remedial statute").

In *Wilander*, Justice O'Connor clearly forecasts the outcome of our present case in her discussion of the need for the concept of a "vessel" to evolve with changing technology. *Wilander*, 111 S. Ct. at 812. Also of prime importance to the present controversy is the Court's citation, with apparent approval, of *Offshore Co. v. Robinson*, 266 F.2d 769 (5th Cir. 1959), from which we adopted the rule in *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975), which the majority now discards. *Id.* at 809. The "seaman" in *Wilander*, was a paint foreman whose duties "consisted primarily of supervising the sandblasting and painting of various fixtures and piping located on oil drilling platforms." *Wilander*, 111 S. Ct. at 809. *Wilander was injured on one such platform.* At the time, he was assigned to a "paint boat" that contained equipment used in sandblasting and painting the platforms. *The drilling platforms were attached to the ocean floor* in a semi-permanent manner.

The facts in Gizzoni sound equally familiar. Several floating work platforms were also involved, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a *crane barge*. *Gizzoni*, 60 U.S.L.W. at 4021. Gizzoni was a rigging foreman on these working platforms and rode them as they were towed into place. The platforms were used to move equipment and supplies *around a shipyard and on and off vessels under repair*. These platforms had no power, means of steering, navigation lights, navigating aids or living facilities. They were moved by tugs, which positioned them as needed. Gizzoni occasionally served as lookout and handled lines from the crew. He was injured while on a platform being used to transport a rudder *from the shipyard to a floating drydock in that yard*.

Appendix A

In *Wilander* the Court said that the issue of who is a "seaman" under the Jones Act [i.e., an employee who contributes to the functions or mission of a vessel], is better characterized as a mixed question of law and fact than as a pure question of fact for the jury. *Wilander*, 111 S. Ct. at 818. But if there are questions of fact "regarding whether the floating platforms were vessels in navigation," these must be submitted to the jury. *Gizzoni*, 60 U.S.L.W. at 4023. However, if "underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." *Wilander*, 111 S. Ct. at 818. "[S]ummary judgment as a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Id.*

As I understand appellant's position, particularly considering the record before the district court, the facts as stated *ante* are not substantially in dispute. *See* Appellant's Brief at 3-7; Petition for Rehearing, at 4. Appellant did not present any evidence challenging appellee's witnesses and the facts dealing with the BETTY F. To this we must add that the BETTY F and the supply barge (and perhaps the crew boat) are a "group of vessels" (*see Gizzoni*, 60 U.S.L.W. at 4021). Although I believe that as a matter of law it could be ruled that appellee was injured while working on a "vessel," I am willing for present purposes, to concede that it is still arguably a jury question. *Id.* We thus look to the new legal standard established by the majority.

Under *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975), relied upon by both the district court and the panel:

> To be a vessel, *the purpose* and business must *to some reasonable degree* be the "transportation of passengers, cargo or equipment from place to place across navigable waters."

(Emphasis supplied).

The Fifth Circuit's "standard," which is purportedly adopted by the *en banc* majority in place of *Bennett*, is found in *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 829 (5th Cir. 1984). In reality the Fifth Circuit sets two different standards:

> a. The first: "[A] structure whose purpose or primary business is not navigation or commerce across navigable waters may nonetheless satisfy Jones Act's vessel requirement if, at the time of the worker's injury, the structure was *actually* engaged in navigation."

Id. (Emphasis in the original).

> b. The second: A Jones Act "vessel" is a structure which "*was designed* or used primarily for the transportation of cargo, equipment or persons across navigable waters OR was, at the time of [the] injuries, engaged in navigation."

Id. (Emphasis and capitals supplied.)

Thus, according to the Fifth Circuit a structure *not designed* for transportation must be in *actual navigation* to be a vessel. *See also Cook v. Belden Concrete Products*, 472 F.2d 999, 1002 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973). If it is *designed* for transportation it does *not* necessarily have to be in actual navigation. I think it relevant to note that in discussing these standards, as applied to "a variety of special purpose structures," the *Binnings* court considers "*the purpose for which the craft was constructed* and the business in which it is engaged," as more conclusive than "the size of the structure, its ability to float, the

permanence of its fixation to shore or bottom, and the fact of its movement across navigable waters . . ." *Binnings*, 741 F.2d at 829 (footnotes omitted). As examples of special purpose structures held to be vessels, the *Binnings* court lists a submersible oil storage vessel facility (*Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (5th Cir. 1975)), a submersible drilling barge (*Producers Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966), and a mobile drilling platform with retractable legs (*Offshore Co. v. Robinson*, 266 F.2d 769 (5th Cir 1959)).[11]

The new standard in the majority opinion is stated as follows:

> [I]f a barge or other float's "purpose or primary business is *not* navigation or commerce," then workers assigned thereto for its principal shore enterprise are to be considered seamen only when it is in actual navigation or transit.

See majority opinion, *ante* at 8. Although this rule purports to follow *Binnings*, particularly when read in context with the rest of the majority opinion, it is clearly more restrictive than *Binnings*. It downgrades, if not totally eliminates, the "designed purpose of the structure" standard and substitutes actual navigation as the sole requirement. This goes far beyond what the Fifth Circuit, or for that matter any circuit, has decided, and will create a new split rather than mend old ones.

In addition to those already stated, there are, in my view,

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11. Although the majority states in its draft that the language in *Offshore* "did not survive [*Binnings*]," and that *Offshore* was "relegated to a footnote [in *Binnings*]," *ante* at 7, I find the "designed to float on water" language in *Offshore* to be very much alive in the second *Binnings* rule quoted above.

other important reasons for not adopting this new rule.

Stare decisis. The *Bennett* rule has been in effect since 1975. It is well understood and has been followed without undue difficulty by the bar and district courts. With due respect, I do not believe the new rule is a sufficient enough reason to depart from this established precedent, at the probable cost of creating uncertainty that will lead to an influx of litigation.

The Bennett rule is a better rule. The Bennett rule more accurately reflects the general maritime law, as is seen from the definition of the term "vessel" in the 27 statutes cited. Applying these definitions to the present situation would promote uniformity in maritime law. In contrast, the new standard will lead to much uncertainty as the same object may be a vessel or non-vessel from moment to moment. The same person, doing the same work, on the same object will receive different legal treatment depending on a totally fortuitous condition. This balkanization of maritime law will be for naught in resolving the owners' insurance problems, as they will still need protection against Jones Act claims for those instances in which the object is legally transformed into a vessel by reason of its movement.

As stated above, the new rule creates unpredictability and haphazardness in its application. For example, does "actual navigation" mean that once the barge comes to a stop and is anchored or docked, it no longer is a "vessel" even if the condition causing the casualty was created or arose while the now non-vessel was in movement? What about the inverse situation? What principled reason is there for distinguishing between a barge and an ocean liner once *it* is anchored or tied to the dock? Under *Wilander* a dance instructor teaching passengers the "cha-cha-cha" aboard an ocean liner tied to the dock is a "seaman," but

under the new rule, appellee, who actually does much more traditional seaman's work, would be denied Jones Act protection because the BETTY F is secured to its spud anchors. What logical reason is there for such a distinction and how would such a rule be framed if it is to make sense? Is the BETTY F "in actual navigation" every night when it is moved away from the bridge or in the mornings when it is moved again alongside? The ambivalence raised by the new rule is endless. Given such uncertainties, is it prudent to change our present rule absent firmer guidance from the Supreme Court?

Finally, given the factual record in this case, I cannot see how even under the new standard, the majority can conclude, as a matter of law, that the BETTY F is not a "vessel." At the very least, the case should be retried on all issues, using the new standard on the Jones Act cause of action as well.

I respectfully dissent.

Appendix A

APPENDIX

a. Rules of Construction Act (1 U.S.C. § 3):

> The word "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water. (Emphasis supplied.)

b. The Shipping Act (46 U.S.C. § 2101(45)):

> ["V]essel" has the same meaning given that term in Section 3 of Title 1.

c. Merchant Marine Act of 1920 (46 U.S.C. § 801):

> [A]ll water craft and other artificial contrivances of whatever description and, at whatever stage of construction, whether on the stocks or launched, *which are used or capable of being or are intended to be used* as a means of transportation on water. (Emphasis supplied.)

d. International Navigational Rules of 1977 (33 U.S.C. § 1601(1)):

> "Vessel" means every description of watercraft, including nondisplacement craft and seaplanes, used *or capable of being used* as a means of transportation on water. (Emphasis supplied.)

e. The Inland Navigation Rules Act of 1980, Rule 3(a) (33 U.S.C. § 2003(a)):

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> The word "vessel" includes every description of watercraft, including nondisplacement craft and seaplanes, used *or capable of being used* as a means of transportation on water. (Emphasis supplied.)

f. Public Health Service Act (42 U.S.C. § 201(i)):

> The term "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water, exclusive of aircraft and amphibious contrivances. (Emphasis supplied.)

g. Excise Taxes Act (26 U.S.C. § 5688(c)):

> ["V]essel" includes every description of watercraft used, *or capable of being used*, or a means of transportation in water or in water and air; . . . (Emphasis supplied.)

h. Whaling Convention Act (16 U.S.C. § 916(e)):

> Vessel: The word "vessel" denotes every kind, type or description of watercraft or contrivance subject to the jurisdiction of the United States used, *or capable of being used*, as a means of transportation. (Emphasis supplied.)

i. Neutrality Act of 1939 (22 U.S.C. § 456(c)):

> The term "vessel" means every description of watercraft and aircraft *capable of being used* as a means of transportation on, under, or over water. (Emphasis supplied.)

Appendix A

j. Navigation Act of 1974 (33 U.S.C. § 1502(19)):

> ["V]essel" means every description of watercraft or other artificial contrivance used as a means of transportation on or through the water.

k. Deepwater Ports Act (33 U.S.C. § 1502(19)):

> ["V]essel" means every description of watercraft or other artificial contrivance used as a means of transportation on or through the water.

l. The Oil Pollution Act of 1990 (33 U.S.C. § 701(37)):

> ["V]essel" means every description of watercraft or other artificial contrivance used, *or capable of being used*, as a transportation on water, other than a public vessel. (Emphasis supplied.)

m. The Sentencing Guidelines Act (18 U.S.C. § 3615):

> As used in this section "vessel" includes every description of watercraft used, *or capable of being used* as a means of transportation in water or in water and air. (Emphasis supplied.)

n. 18 U.S.C. § 3667:

> As used in this section, "vessel" includes every description of watercraft used, *or capable of being used*, as a means of transportation in water or in water and air. (Emphasis supplied.)

Appendix A

o. The Communications Act of 1934 (47 U.S.C. § 153(w)(1)):

> ["V]essel" includes every description of watercraft or other artificial contrivance, except aircraft, used or *capable of being used*, as a means of transportation on water, whether or not it is actually afloat. (Emphasis supplied.)

p. The Tariff Act of 1930 (19 U.S.C. § 1401(a)):

> The word "vessel" includes every description of watercraft or other contrivance used, *or capable of being used*, as a means of transportation in water, but does not include aircraft. (Emphasis supplied.)

q. The Interstate Act Against Importation and Exportation of Motor Vehicles, Vessels and Aircraft Act. (18 U.S.C. § 553(c)(3)):

> ["V]essel" has the meaning given that term in Section 401 of the Tariff Act of 1930 (19 U.S.C. 1401, *ante*).

r. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CFRCLA) (42 U.S.C § 9601(28)).

> The term "vessel" means every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water.) (Emphasis supplied.)

s. The Anti-Gambling Act (18 U.S.C. § 1081):

> The term "vessel" includes every kind of water and aircraft or other contrivance used *or capable of being used* as a means of transportation on water, or on water and in the

air, as well as any ship, boat, *barge*, or other watercraft or any structure capable of floating on the water. (Emphasis supplied.)

t. The Federal Ship Mortgage Insurance Act (46 U.S.C. § 1271(b)):

The term "vessel" includes all types, whether in existence or under construction, of passenger cargo and combination passenger cargo carrying vessels, tankers, tugs, towboats, *barges*, dredges and ocean thermal energy conversion facilities or plant ships which are or will be documented under the laws of the United States, . . . (Emphasis supplied.)

u. The Contraband Seizure Act (49 U.S.C. § 787(a)):

The term "vessel" includes every description of watercraft or other contrivance used, or *capable of being used*, as a means of transportation in water, but does not include aircraft. (Emphasis supplied.)

v. The Antifouling Paint Control Act of 1988 (33 U.S.C. § 2401(11)):

The term "vessel" includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water. (Emphasis supplied.)

w. The Interstate Commerce Act (49 U.S.C. § 10102(28)):

The term vessel means a watercraft or other artificial contrivance that is used, *is capable of being used, or is*

intended to be used, as a means of transportation by water. (Emphasis supplied.)

x. The Submarine Cable Act (47 U.S.C. § 30):

[T]he term vessel shall be taken to mean every description of vessel used in navigation, in whatever way it is propelled . . .

APPENDIX B — JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED MARCH 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1957

ROCCO P. DIGIOVANNI, JR.,

Appellee,

v.

TRAYLOR BROTHERS, INC.,

Appellant.

JUDGMENT

Entered March 4, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the opinion en banc filed this date.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

Appendix B

By: DANIEL A. LOUGHRY
Chief Deputy Clerk

(cc. Messrs. Rothschild, Kaplan)

APPENDIX C — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 17, 1991

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 90-1957

ROCCO P. DIGIOVANNI, JR.,
Plaintiff, Appellee,

v.

TRAYLOR BROTHERS, INC.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Ernest C. Torres, *U.S. District Judge*]

Before
Torruella, *Circuit Judge*,
Aldrich and Bownes, *Senior Circuit Judges*.

Andrew Rothschild, with whom *John D. Husmann* and *Lewis, Rice & Fingersh*, were on brief for appellant.

David B. Kaplan, with whom *Thomas M. Bond, The Kaplan Group, P.C., Paul V. Gallogly* and *Lovett, Schefrin, Gallogly & Harnett, Ltd.*, were on brief for appellee.

TORRUELLA, *Circuit Judge*. This case arose as a result of personal injuries sustained by Rocco P. DiGiovanni, Jr., while employed by Traylor Brothers ("Traylor Bros.") as a pile driver on the Jamestown, Rhode Island, bridge project. Three counts went to the jury: (1) negligence under the Jones Act, 46 U.S.C.

§ 688; (2) unseaworthiness under general maritime law; and (3) negligence under 33 U.S.C. § 905(b). The jury found in favor of DiGiovanni on the first two counts, thereby finding it unnecessary to reach the third. After judgment was entered, Traylor Bros. moved for a new trial, or in the alternative, moved to alter or amend the judgment and for judgment notwithstanding the verdict. All motions were denied. Traylor Bros. appealed. On appeal, Traylor Bros. advances two theories why judgment for DiGiovanni was improper. First, Traylor Bros. maintains that the barge to which DiGiovanni was assigned does not qualify as a "vessel" for purposes of the Jones Act or general maritime law. Second, Traylor Bros. contends that DiGiovanni does not fit within the definition of "seaman" under the Jones Act. We disagree.

VESSEL STATUS

"Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a " 'vessel'." *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 646 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973). We phrase our analysis in terms of the Jones Act; however, a finding of vessel status under the Jones Act applies equally to general maritime law. *Id.* at 646-48. "The existence of a vessel is a 'fundamental prerequisite to Jones Act jurisdiction.' " *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990) (quoting *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990) (quoting *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 828 (5th Cir. 1984)). What constitutes a vessel is ordinarily a jury question. In rare cases, however, when what emerges from the facts and inferences taken in the light most favorable to the plaintiff does not conform with the legal standard of what may properly be classified as a vessel, the district court should not allow the question to go to the jury.

Powers, 477 F.2d at 646. Traylor Bros. maintains that DiGiovanni's claim should have been treated as one of those rare cases. Because this raises a question of law, we exercise plenary review. *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989).

The First Circuit has not confronted this issue since the early 1970s. *See Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975); *Powers*, 477 F.2d 643. At that time, we articulated the following standard: "To be a vessel, the purpose and business must *to some reasonable degree* be the 'transportation of passengers, cargo, or equipment from place to place across navigable waters.' " *Bennett*, 510 F.2d at 116 (quoting *Powers*, 477 F.2d at 647) (emphasis added). Traylor Bros. requests that we modify our standard in accordance with more recent developments in the Fifth Circuit. The Fifth Circuit has adopted a narrower standard which compares a craft's transportation function with its other functions; if its "transportation function remains *subordinate* to its contrasting function[s]," then the craft may not be classified as a vessel. *Gremillion*, 904 F.2d at 294 n.9 (emphasis added). Despite Traylor Bros.' urging, we are constrained by First Circuit precedent. *See Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 44 n.5 (1st Cir. 1988) (stating that *stare decisis* requires panels in this circuit to follow circuit precedent); *Eubank Heights Apartments, Ltd. v. Lebow*, 669 F.2d 20, 23 n.2 (1st Cir. 1982) (same).

We now apply the legal standard to the facts of this case. Because this was the domain of the jury, "we are compelled even in a close case [such as this], 'to uphold the verdict unless the facts and inferences, when viewed in a light most favorable to the [plaintiff], point so strongly and overwhelmingly in favor of the [defendant] that a reasonable jury could not have arrived at this conclusion.' " *Transnat'l Corp. v. Rodio & Ursillo, Ltd.*,

920 F.2d 1066, 1068 (1st Cir. 1990) (quoting *Chedd-Angier Production Co. v. Omni Publications Int'l, Ltd.*, 756 F.2d 930, 934 (1st Cir. 1985)).

The craft involved in this case were a "spud" barge named the "BETTY F" and an adjoining supply barge. Although DiGiovanni mainly worked as a pile driver on board the BETTY F, his injury was sustained while handling tag lines aboard the supply barge. That fact, however, presents no bar to recovery. *Balfer v. Mayronne Mud & Chemical Co., Inc.*, 762 F.2d 432, 434 (5th Cir. 1985) (a vessel may be "either one particular vessel or an 'identifiable group of vessels' " (quoting *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir. 1981)).

The BETTY F's main purpose was to serve as a floating platform for a large crawler crane used in pile driving. Located on the BETTY F along with the crane were a tool shed, a trailer box converted into a small cafeteria with a stove, and a refrigerator. The BETTY F also came equipped with navigation lights. The BETTY F could not move great distances on its own, but it could reposition itself around the jobsite by raising and lowering its four spud anchors. Approximately once each month the BETTY F was moved across navigable waters, aided by a tow or push boat, in order to transport the crane to a new jobsite.

The supply barge upon which DiGiovanni was injured housed supplies and equipment including steel piling beams, a pile driver hammer, and a power pack. The barge was used to transport these supplies from shore to the jobsite, although not under its own motive power. Neither the supply barge nor the BETTY F provided housing for crew members. The daily work crew had to be transported to and from the jobsite on a crew boat.

Appendix C

The BETTY F and its supply barge strongly resemble the craft under question in *Bennett*. *Bennett* involved a steel-hulled barge named the "SCOW 101" which was also without motive power of its own. Like the BETTY F, the SCOW 101 had to be towed from jobsite to jobsite. The SCOW 101 was used to carry structural materials, tools, and a crane. At the time of plaintiff's injury, the SCOW 101 was tied alongside a pier of the Newport-Jamestown Bridge in Narragansett Bay. *Bennett*, 510 F.2d at 115-16. On appeal, this court determined that the SCOW 101 was more than a "floating dock[] or dry-dock[], traditionally regarded as [an] extension[] of land." *Id.* at 116. We conferred upon the SCOW 101 the status of vessel.

While we recognize that the transportation function of the BETTY F and its supply barge, like the SCOW 101 in *Bennett*, was not overwhelming, both barges nevertheless transported equipment across navigable waters sufficiently often for that function to have been considered by a jury as being "to some reasonable degree" the function of the craft. We will not, therefore, overturn the determination below.

SEAMAN STATUS

Having determined that a vessel was involved, we now consider whether DiGiovanni was properly labelled a "seaman" for purposes of the Jones Act.[1] *See Gremillion*, 904 F.2d at 292 (holding that the existence of a vessel is a prerequisite to seaman status). We again find ourselves faced with a legal challenge.

---

1. The Jones Act provides: "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law." 46 U.S.C. § 688 (1920).

Traylor Bros. questions the appropriateness of the legal standard relied upon by the district court in attributing seaman status to DiGiovanni. We therefore begin our analysis under plenary review. *Fashion House*, 892 F.2d at 1083.

At the time Traylor Bros. filed this appeal, circuits were split as to the proper standard for determining seaman status. The leading circuits reflecting that split were the Fifth, *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and the Seventh, *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). The Fifth Circuit adopted the following two-part test: If an employee (1) was assigned permanently to a vessel or performed a substantial amount of work on a vessel and (2) worked in a capacity or manner which "contributed to the function of the vessel or to the accomplishment of its mission, or the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips," then the employee qualified for seaman status. *Robison*, 266 F.2d at 779; *see also Barrett v. Chevron, U.S.A. Inc., E.E.B. Co.*, 781 F.2d 1067, 1072 (5th Cir. 1986). The Seventh Circuit favored a more stringent standard which required the employee's duties to be related to the transportation function of the vessel. *Johnson*, 742 F.2d at 1061. This circuit followed *Robison*. *Bennett*, 510 F.2d at 116-17.

Since Traylor Bros.' appeal, the Supreme Court has settled this dispute. *See McDermott Int'l, Inc. v. Wilander*, 1991 WL 177734 (U.S.). The Seventh Circuit standard was clearly rejected. *Id.* at 10 ("We think the time has come to jettison the aid in navigation language"). The proper inquiry, as articulated by the Court, is whether the employee is connected with a vessel and is performing the work of the vessel. *Id.* at 10-11. "It is not necessary that [the] seaman aid in navigation or contribute to

the transportation of the vessel;" the employee simply must be "doing the ship's work." *Id.* at 11.

The issue now becomes "whether the facts meet the statutory standard." *Id.* It is the province of the jury to find the facts and apply the legal standard. *Id.* at 12. The jury determination will be upheld if, based on the facts taken in the light most hospitable to the party for whom the jury held, together with all reasonable inferences therefrom, a rational jury could have reached that conclusion. *Rodio & Ursillo*, 920 F.2d at 1068.

Applying a standard substantially similar to the one adopted in *Wilander*,[2] the jury in this case determined that DiGiovanni qualified for seaman status. We see no reason to overturn that finding on appeal. The main function of the BETTY F was to act as a platform for a crawler crane used in pile driving. DiGiovanni was assigned to the BETTY F as a pile driver and was injured while steadying tag lines connected to the pile driver hammer. Clearly DiGiovanni was doing the work of the vessel.

CONCLUSION

We uphold the district court's determination regarding both vessel status and seaman status.. The jury's finding of negligence under the Jones Act and unseaworthiness under generai maritime law is therefore *affirmed*.

---

2. The district judge instructed the jury that DiGiovanni qualified for seaman status if he met the following two requirements: (1) "he [was] assigned permanently to a vessel or he performed a substantial part of his work on a vessel," and (2) "the capacity in which he was employed or the duties which he performed [] contributed to the functions of the vessel or the accomplishment of its mission or its operation or welfare during its movement or during anchorage."

Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

(2)

No. 91-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROCCO P. DIGIOVANNI, JR.,
Petitioner,

VS.

TRAYLOR BROTHERS, INC.,
Respondent.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RULE 29.1 LIST

Respondent Traylor Brothers, Inc. does nct have any subsidiaries, parent companies or affiliates that have issued shares of stock to the public.

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No. 91-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROCCO P. DIGIOVANNI, JR.,
Petitioner,

VS.

TRAYLOR BROTHERS, INC.,
Respondent.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

Plaintiff/Petitioner Rocco P. DiGiovanni, Jr. ("DiGiovanni") filed a Complaint against his employer Defendant/Respondent Traylor Brothers, Inc. ("Traylor Brothers") in the United States District Court for the District of Rhode Island. DiGiovanni's Complaint was submitted to a jury, after trial on May 14, 15 and 17, 1990, on three counts: Count I for negligence under the Jones Act, 46 U.S.C. §688; Count II for unseaworthiness under the General Maritime Law; and, alternatively, Count V for negligence under section 905(b) of The Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. §901 et.seq. The jury found in favor of DiGiovanni on Counts I and II

and awarded damages of Three Hundred Thirty-Three thousand Four Hundred and Sixteen Dollars ($333,416).

Traylor Brothers appealed to the United States Court of Appeals for the First Circuit (No. 90-1957) and raised two issues on appeal. First, Traylor Brothers argued that DiGiovanni did not meet the test for status of a "seaman" under the Jones Act because his employment did not contribute to the "navigation or transportation function" of the vessel or structure to which he was assigned. At the time of the appeal, the circuits were split on the appropriate standard for the employment relation prong of the "seaman" test[1] and this Court had granted certiorari in *Wilander v. McDermott International, Inc.*, 887 F.2d 88 (5th Cir.), *cert. granted*, __ U.S. __, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990) to consider the issue. This Court handed down its decision in *Wilander*, 498 U.S. __, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991), on February 19, 1991, while Traylor Brothers's appeal was pending. The *Wilander* decision resolved this pending issue adversely to Traylor Brothers.

The second issue raised by Traylor Brothers' in its appeal concerned whether the spud barge Betty F, used as a work platform for pile-driving operations, and the supply barge on which DiGiovanni was injured, were "vessels in navigation" under the vessel prong of the "seaman" test. The First Circuit had not considered this issue since 1975 in *Bennett v. Perini Corp.*, 510 F.2d 114 (lst Cir. 1975). Since that time, other circuits had narrowed the scope of the test for structures to qualify as "vessels

---

[1] In *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), the Fifth Circuit applied the more expansive "contribution to the function of the vessel or accomplishment of its mission" test. The Seventh Circuit, in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), applied the more restrictive "aid to the navigation or transportation function" standard.

in navigation" for purposes of the Jones Act.[2] Traylor Brothers contended, on appeal, that the First Circuit should depart from the vessel standard in *Bennett v. Perini Corp.*, and conform its vessel test to the prevailing standard utilized in other circuits — in the interest of uniformity among the circuits on the issue.

On April 17, 1991, the First Circuit affirmed the district court (App. C, Petition for Writ of Certiorari ("Petition")), holding that: (1) the *Wilander* decision determined the employment relation prong issue adversely to Traylor Brothers, and (2) the panel of the appellate court was "constrained by First Circuit precedent" from adopting the prevailing vessel test in other circuits.

Traylor Brothers filed its timely Motion for Rehearing or Rehearing En Banc. On September 11, 1991, the First Circuit (En Banc) entered its order withdrawing the decision of the panel and vacating the judgment of the court. Rehearing en banc was granted "limited to the question of whether *Bennett v. Perini Corp.*, 510 F.2d 114 (lst Cir. 1975), should remain circuit precedent; and, if not, how a proper reformulation of the rule of law affects the case *sub judice*."

On March 4, 1992, the First Circuit (En Banc) issued its decision (App. A, Petition) reversing the judgment and remanding the case to the district court. In its opinion, the First Circuit discussed the evolution of the "vessel in navigation" test. The First Circuit observed that it had previously followed the Fifth Circuit case of *Offshore Company v. Robinson, supra*, in reaching its 1975 *Bennett* decision. (App. A, pp. 6a-7a, Petition.) The First Circuit, after citing and discussing the Fifth Circuit cases that thereafter revised the "vessel in navigation" standard, held:

---

[2] See *Bernard v. Binnings Construction Co. Inc.*, 741 F.2d 824 (5th Cir. 1984); *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures. Inc.*, 896 F.2d 504 (llth Cir. 1990).

> Just as we relied on *Offshore* in the past, we believe we should now accept the Fifth Circuit's improved version. In sum, if a barge, or other float's 'purpose or primary business is not navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

(App. A, 9a, Petition.)

The First Circuit then applied the undisputed facts of the case to the "vessel in navigation" standard it adopted, in conformance with the prevailing standard in other circuits, and held that the spud barge Betty F was not a vessel in navigation as a matter of law. Accordingly, it denied DiGiovanni any recovery under the Jones Act.[3]

SUMMARY OF ARGUMENT

1. The decision of the First Circuit is not in conflict with decisions of other circuits or decisions of this Court. In fact, the decision brings the First Circuit into conformity with the prevailing standard utilized by the other circuits for the "vessel in navigation" test under the Jones Act.

2. The decision is not in conflict with any federal statute.

3. There are no special or important reasons which would justify the exercise by this Court of its discretion to grant the Petition for Writ of Certiorari.

---

[3] The First Circuit did remand the case for a trial on the negligence issue under the LHWCA. (App. A, p. lla, Petition.)

REASONS FOR DENYING THE WRIT

As stated in his Question Presented for Review, DiGiovanni asks this Court to grant certiorari to review the fact laden question of whether the particular floating structure on which he worked was a "vessel" within the meaning of the Jones Act. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This Court has stated: "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Because DiGiovanni can assert no basis for this Court exercising its discretionary jurisdiction through a writ of certiorari, *see* Sup. Ct. R. 10, his petition should be denied.

I. THE DECISION OF THE FIRST CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR DECISIONS OF THIS COURT.

A. THE DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The decision of the First Circuit expressly conformed the "vessel in navigation" standard for the First Circuit to the standard currently utilized in other circuits. The First Circuit last considered this issue in the early 1970's in *Powers v. Bethlehem Steel Corporation*, 477 F.2d 643 (lst Cir. 1973) and *Bennett v. Perini Corporation, supra*. In those cases, the First Circuit followed the then-prevailing view of the Fifth Circuit and held that for a structure to be a vessel ". . . the purpose and business must to some reasonable degree be the transportation of passengers, cargo or equipment from place to place across navigable waters'." *Bennett*, 510 F.2d at 116 (quoting *Powers*, 477 F.2d at 647).

The Fifth Circuit has led in a narrowing of the standard for determining a "vessel in navigation" since 1975. In *Bernard v. Binnings Construction Co. Inc.*, 741 F.2d 824, 831 (5th Cir. 1984), the Fifth Circuit fashioned a three-part test for determining, as a matter of law, whether a structure qualified as a "vessel in navigation":

> 1. The structures involved were constructed and used primarily as work platforms;
>
> 2. They were moored or otherwise secured at the time of the accident; and
>
> 3. Although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation functions they performed were merely incidental to their primary purpose of serving as work platforms.

Subsequent cases applied this standard and amplified factors to be considered in resolving the first element of the above-cited test regarding whether the structures were constructed and used primarily as work platforms. *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 43 (5th Cir. 1989); *Gremillion v. Gold Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990); *Ducrepont v. Baton Rouge Marine Enterprises. Inc.*, 877 F.2d 393 (5th Cir. 1989).

In two recent cases, the Fifth and Eleventh Circuits have applied this vessel test to spud barges used as work platforms (comparable to the spud barge in this case) and have affirmed summary judgments for defendants by concluding the structures were not "vessels in navigation". *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990). *Hurst v. Pilings & Structures. Inc.*, 896 F.2d 504 (llth Cir. 1990).

A review of the First Circuit's decision in this case reveals a clear intent to adopt and follow the prevailing case law on this point from the other circuits—principally the Fifth Circuit. In

fact, one Eleventh Circuit case cited by DiGiovanni as evidence of a disparity in the standards, *Hurst v. Pilings & Structures, Inc., supra,* is expressly cited by the First Circuit in its decision. (App. A, p. 8a, Petition.) Another case cited by DiGiovanni, *Johnson v. Odeco Oil & Gas Co., supra,* applies the vessel standard and amplifies factors to be considered in applying one element of the "vessel-in-navigation" test and nothing in the First Circuit's opinion in this case conflicts with the holding in *Johnson.*

The two remaining cases cited by DiGiovanni for his argument of a purported split in the circuits actually apply the same test but are distinguishable factually. *Sharp v. Johnson Brothers Corp.*, 917 F.2d 885 (5th Cir. 1990); *Ducote v. V. Keeler & Co., Inc.*, 953 F.2d 1000 (5th Cir. 1992). In each of those cases, the Fifth Circuit found sufficient facts existed to submit the vessel issue to the jury. As a result, in *Sharp*, a directed verdict for defendant was reversed and remanded. In *Ducote*, a summary judgment for defendant was reversed and remanded. Unlike the First Circuit's decision in this case, the Fifth Circuit in each of those cases found sufficient facts existed relating to movement and transportation of the structure to preclude summary judgment or directed verdict. But the critical point for consideration here is that the Fifth Circuit utilized the same standard in those cases as in *Bernard v. Binnings Construction Company, Inc., supra,* and the line of cases following it. *See Sharp,* 917 F.2d at 888; *Ducote,* 953 F.2d at 1003.

Accordingly, DiGiovanni has provided no authority to substantiate his contention that the First Circuit decision has created a split in the circuits. The First Circuit's decision has, in fact, resolved an arguable split in authority that might otherwise have existed.

B. THE DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

DiGiovanni has erroneously asserted that the First Circuit decision is in conflict with one or more decisions of this Court. None of the cases cited in support of this contention even consider the "vessel in navigation" test issue under the Jones Act.

Initially, DiGiovanni states that the First Circuit decision is an "affront" to the recent decision of *Southwest Marine. Inc. v. Gizoni*, __ U.S. __, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991) in that the structure in *Gizoni* had more physical features associated with a vessel. In *Gizoni*, this Court did not consider any issue relating to the "vessel in navigation" test under the Jones Act.[4] Instead, the issue was whether a maritime worker whose occupation (ship repairman) was expressly enumerated in the LHWCA was precluded from bringing an action as a seaman under the Jones Act as a matter of law. This Court answered this question in the negative. *Gizoni*, 116 L.Ed.2d at 418.

DiGiovanni also contends that the First Circuit decision "conflicts with this Court's rationale behind" *McDermott International Inc. v. Wilander, supra*. In *Wilander*, this Court did not consider any issue regarding the "vessel in navigation" test. Rather, the court resolved a split in the circuits on the employment relation prong of the seaman's test regarding the individual's job duties.

Lastly, DiGiovanni argues that this Court has previously agreed that "non-conventional watercraft" with lesser mobility are vessels for purposes of the Jones Act. *Gianfala v. The Texas*

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[4] The Ninth Circuit reversed summary judgment for defendant on two bases: 1) questions of fact existed as to plaintiff's status as a seaman; and 2) it rejected the district court's ruling that Gizoni, having received LHWCA benefits, was precluded from pursuing remedies as a Jones Act seaman as a matter of law. *Gizoni* at 116 L.Ed.2d 413-14.

Co., 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). This contention, on its face, is not one of conflict with past decisions of this Court. Further, in *Gianfala,* this Court merely issued a per curiam order without opinion reversing the circuit court and reinstating the jury's verdict. 350 U.S. 879. Additionally, the "vessel in navigation" test was not an issue in the lower courts in that case.

In *Senko*, this Court, again, did not consider the "vessel in navigation" test. Instead, the issue concerned application of the employment relation prong of the seaman's test. The discussion of the opinion focused exclusively on the petitioner's job duties in considering whether sufficient facts existed to uphold a determination that he was a "member of the crew."

II. THE DECISION DOES NOT CONFLICT WITH ANY FEDERAL STATUTE.

DiGiovanni admits that the term "vessel" does not appear in the Jones Act and, therefore, no statutory construction issue exists. The term "vessel" or "vessel in navigation" is part of a judicially crafted test for application of the term "seaman" in 46 U.S.C. §688(a). The interpretation of the term "vessel in navigation" has evolved for the purpose of aiding in the overall application of the Jones Act to various employees in varying circumstances with some connection to maritime commerce.

As a result, the judicial interpretation of the term "vessel in navigation" for purposes of application of the Jones Act—by the First Circuit or any other court—can not conflict with the term as used in any federal statute, regardless of the statutory context. Apparently DiGiovanni does not contest this point, but instead argues that the judicial interpretation of the term "vessel" *should* coincide with the term as construed in one or more of the various cited statutes. This contention is without merit. DiGiovanni fails to cite any Jones Act precedent of this Court or any other court which relies on the any one of the various statutory definitions of

"vessel" in determining whether a plaintiff is a Jones Act seaman.

As this Court stated in *Wilander*, "[a]ll who work at sea in service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." 111 S.Ct. at 817, 112 L.Ed.2d at 882. The statutory definitions which DiGiovanni seeks to have grafted onto the years of Jones Act decisional precedent defining "vessel" would expand the protection of the Jones Act beyond that intended by Congress or recognized by this Court in *Wilander*. A common thread running through many of the other statutory definitions of vessel is the phrase "*capable of being used* as a means of transportation on water." (Petition, Appendix A, 23a-28a) (emphasis by the court). Under such a definition an out-of-service steamer which is permanently moored to the shore and used as a beach front restaurant is now a "vessel" because it is *capable* of being used as a means of transportation on the water. Thus, the waiter, who was previously covered by the state's workers compensation laws, now becomes a Jones Act seamen because of the restaurant's new-found vessel status. Such shore-based workers do not "work at sea in service of a ship [and] face those particular perils to which the protection of maritime law . . . is directed." *Wilander*, 111 S.Ct. at 817, 112 L.Ed.2d at 882. As this Court stated in *Wilander* and reaffirmed in *Gizoni*, "the key to seaman status is employment-related connection to a vessel *in* navigation." *Wilander*, 111 S.Ct. 807, 112 L.Ed.2d at 882; *Gizoni*, 112 S.Ct. 486, 116 L.Ed.2d at 415. (emphasis supplied). That the structure may at some future point in time be capable of being used as a means of transportation on the water does not answer the question of seaman status. This is why the Jones Act jurisprudence defining vessel status has been judicially developed and has evolved separately from the other statutory definitions cited by DiGiovanni.

III. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHICH WOULD JUSTIFY THE EXERCISE BY THIS COURT OF ITS DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

There is no aspect of this case which warrants review by this Court. The First Circuit, in its decision, responsibly reviewed and revised its "vessel in navigation" standard in order to achieve uniformity among the circuits on this issue. Just as it did in the early 1970's, the First Circuit in this case followed the prevailing view of the other circuits—principally the Fifth Circuit.

Any decision by this Court to review this case would run counter to the implicit motivation associated with Rule 10.1(a) of this Court's Rules which prompts the various circuits to conform their decisions on an issue and avoid conflict among themselves.

DiGiovanni asserts that this Court should review this case because he believes the First Circuit's decision may be ambiguous and, consequently, may spawn further litigation. Even if this Court would accept DiGiovanni's assertion, no basis for granting a writ of certiorari would exist. The circuit court, as always, should be afforded the opportunity to clarify any ambiguity in one of its own decisions before this Court should utilize its limited resources in the matter.

CONCLUSION

DiGiovanni's Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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